66 FLRA No. 15

SOCIAL SECURITY ADMINISTRATION
INDIANAPOLIS, INDIANA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
(Union)

0-AR-4041

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DECISION

August 31, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Anna Du Val Smith filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union did not file an opposition to the Agency's exceptions.

The Arbitrator sustained the grievance and found that the Agency violated the parties' collective bargaining agreement (CBA) by denying the grievant's request for annual leave on the day after a federal holiday. For the reasons set forth below, we deny the Agency's contrary to law and essence exceptions. We also set aside the remedies ordered and remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

II. Background and Arbitrator's Award

The grievant is employed as a claims representative in the Agency's Indianapolis office. Prior to 2004, the Agency had a practice that permitted up to two-thirds of its employees to use annual leave on the day before or the day after a federal holiday. Award at 2. In early 2004, the Agency decided to change the practice and permit only one-half of its employees to use annual leave on these days. *Id.*

In April 2004, the Agency denied the grievant's request for annual leave on July 6, the first business day after the Fourth of July holiday, because "leave slots" were unavailable.[2] *Id*. at 3. The Union filed a grievance alleging that the Agency's denial of the grievant's request for annual leave violated the CBA.[3] When the grievance was not resolved, it was submitted to arbitration. *Id*. The parties were not able to agree on the issues to be presented to the Arbitrator. The Arbitrator did not specifically set forth any issues, but considered and resolved both parties' formulations.[4]

First, addressing the issues framed by the Union, the Arbitrator found that it was within management's discretion to change the practice of permitting up to two-thirds of its employees to use annual leave on the day before or the day after a federal holiday. *Id*. at 6. Citing this finding, the Arbitrator declined to address the

[1] Member DuBester's separate opinion, dissenting in part, is set forth at the end of this decision.

[2] Under the Agency's two-thirds practice, leave requests were approved for the day before or the day after a federal holiday provided that sufficient slots were available. Award at 2.

[3] While the grievance was pending, the Union filed a ULP charge alleging that the Agency violated § 7116(a)(1) and (2) of the Statute by unilaterally changing a past practice concerning annual leave usage before or after a holiday. A Regional Director of the Authority dismissed the ULP charge on the basis that the issue -- the number of employees allowed to use leave -- was covered by the CBA and, as such, the Agency was not required to bargain. Exceptions, Ex. E.

[4] The Agency framed the issue as: "Whether Agency management violated the [CBA] by denying the grievant's request for annual leave for July 6, 2004. If so, what is the remedy?" Award at 3. The Union framed the issues as:

> 1. By April 2004, did the . . . office have a practice of allowing two-thirds of it[s] employees to take annual leave the day before and the day after a holiday; and had the practice been consistently exercised for an extended period of time, with the [A]gency's knowledge and express or implied consent, so as to become an enforceable condition of employment pursuant to Article 1[,] Section 2[,] [p]ast practice of the [CBA]?
> 2. If yes, did the [A]gency commit [a ULP under] 5 U.S.C. [§] 7116 by unilaterally changing an established past practice [under] 5 U.S.C. [§] 7116(a)(5)?
> 3. If yes, what shall be the remedy?

Id. at 3-4.

Union's unfair labor practice (ULP) claim that the Agency unilaterally changed a past practice. *Id.*

The Arbitrator then addressed the issue framed by the Agency. That issue concerned whether the Agency violated Article 31, Section 2.B of the CBA when it denied the grievant's annual leave request.[5] The Arbitrator found that the Agency violated the CBA. She noted that Article 31, Section 2.B required the Agency to "'make every effort to allow the maximum number of employees to use . . . leave.'" *Id.* at 7 (quoting CBA). However, the Arbitrator found that the Agency had not done so.

Specifically, the Arbitrator found that the Agency failed to identify any conditions requiring it to increase the number of employees necessary to operate the office on the day for which the grievant requested annual leave. *Id.* Furthermore, the Arbitrator found it "troubling" that the Agency did not collect data or perform any analysis to support its decision to reduce the number of employees permitted to use annual leave at such times. *Id.* Rather, the Arbitrator noted, referring to the Agency's decision to permit only fifty percent of its employees to use annual leave on the day before or the day after a federal holiday, "[f]ifty percent was 'just the first number . . . picked to see if it would work out.'" *Id.* (quoting an Agency manager's testimony). Based on the foregoing, the Arbitrator concluded that the Agency "acted arbitrarily and thus violated Article 31 of the [CBA] when it denied the [g]rievant's request for annual leave on July 6 . . . pursuant to its [fifty] percent policy." *Id.* at 7-8. Accordingly, the Arbitrator sustained the grievance.

[5] Article 31, Section 2.B provides in pertinent part, that:

> B. Normally, leave requested in advance will be granted except where conflicts of scheduling or undue interference with the work of the Administration would preclude it. Leave may also be granted when it is not scheduled in advance and business permits. Leave for personal emergencies, ordinarily infrequent in number, will be granted unless there is an operational exigency which requires the employee's presence. Requests for leave based on the death of a family member or any individual related by affinity will be considered a personal emergency for leave approval. The [Agency] will make every effort to allow the maximum number of employees to use leave.

Award at 5.

As a remedy, the Arbitrator directed the Agency to restore its practice of allowing two-thirds of its employees to use annual leave on the day before or the day after a federal holiday and to revisit annual leave decisions already made regarding future holidays. *Id.* at 8. The Arbitrator ruled that the Agency is not barred from discontinuing the two-thirds practice in the future as "long as it exercises its discretion appropriately." *Id.* However, the Arbitrator "recommend[ed], but d[id] not require" that the Agency provide the Union with advance notice and the opportunity to consult before implementing any new practice in this area. *Id.*

III. Agency's Exceptions

The Agency's first exception claims that the award is contrary to law because it impermissibly affects management's right to assign work under § 7106(a)(2)(B) of the Statute. The Agency argues that the award restricts its discretion to determine when work will be performed and the number of employees permitted to take annual leave on certain days. Exceptions at 5.

In connection with its management rights exception, the Agency argues that the award fails to satisfy prong I of *United States Department of the Treasury, Bureau of Engraving & Printing, Washington., D.C.*, 53 FLRA 146 (1997) (*BEP*) because Article 31, Section 2.B, as interpreted by the Arbitrator, is not an appropriate arrangement. Exceptions at 6-7. Specifically, the Agency argues that the provision is not an arrangement "because it does not act as redress for adverse effects suffered by employees." *Id.* at 7. The Agency also argues that the provision is not sufficiently tailored as an arrangement to compensate only those employees suffering adverse effects attributable to the exercise of its management rights. *Id.* Finally, the Agency asserts that the award excessively interferes with its management right to assign work under § 7106(a)(2)(B). *Id.* at 7-8. Specifically, the Agency argues that the award places a "significant burden" on its management right because it requires that the Agency provide "detailed data and analysis" to support its decision "every time it re-determines the number or percentage of employees permitted to take leave on a certain day[.]" *Id.*

The Agency's second exception alleges that the award is contrary to law because it imposes a status quo ante (SQA) remedy. *Id.* at 9. The Agency claims that such a remedy can only be imposed when an agency has committed a ULP. *Id.* Referring to the Regional Director's determination dismissing the ULP charge, *supra* note 3, the Agency asserts that "[t]he Authority . . . ruled . . . that the Agency did not commit a ULP violation when making this change" to its policy. *Id.* In addition,

the Agency claims that an SQA remedy is not appropriate because the Arbitrator did not find a ULP. *Id.*

The Agency's third exception asserts that the award fails to draw its essence from the CBA. The Agency argues that the Arbitrator's interpretation of Article 31, Section 2.B is not plausible. *Id.* at 8. Specifically, the Agency claims that the Arbitrator's interpretation of Article 31, Section 2.B imposes a "high evidentiary burden" by requiring the Agency to "provide detailed evidence regarding workloads every time it exercises its statutory right to determine the number of employees assigned to work on a particular day in a particular office . . . ." *Id.* The Agency contends that "[i]t is implausible that [the Agency] intended or consented to place upon itself such a high evidentiary burden[.]" *Id.* at 9.

The Agency's fourth exception argues that the Arbitrator exceeded her authority. In this regard, the Agency contends that the Arbitrator issued a remedy that went beyond the scope of the matter submitted to arbitration. *Id.* at 10. The Agency claims that the remedy, which restored the two-thirds policy and directed the Agency to "revisit all leave decisions already made for upcoming holidays," reached beyond the scope of the narrow issue before the Arbitrator because it afforded a remedy to parties not encompassed within the grievance and in response to Agency actions that were not at issue. *Id.*

IV. Analysis and Conclusions

A. The award is not contrary to law.

1. The award affects management's right to assign work.

The Agency claims that the award is contrary to law because it impermissibly affects management's right to assign work under § 7106(a)(2)(B). Exceptions at 6.

When a party's exception challenges an arbitration award's consistency with law, the Authority reviews the questions of law raised in the exception and the arbitrator's award de novo. *SSA, Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001); *see also NFFE, Local 1437*, 53 FLRA 1703, 1709 (1998). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable legal standard. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Authority revised the analysis that it will apply when reviewing management rights exceptions to arbitration awards. *See U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (*EPA*) (Member Beck concurring); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (*FDIC, S.F. Region*) (Chairman Pope concurring). Under the revised analysis, the Authority assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[6] *Id.* Also, under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See EPA*, 65 FLRA at 116-18.[7] In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 118.

The Agency argues that the award restricts its discretion to determine when work will be performed and the number of employees permitted to take annual leave on certain days. Exceptions at 5. The right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine when work will be performed. *See NAGE, SEIU, AFL-CIO*, 40 FLRA 657, 670 (1991). Provisions that place restrictions on an agency's right to determine when annual leave may be used and when work will be performed affect management's right to assign work. *See, e.g., NFFE, Local 405*, 42 FLRA 1112, 1126 (1991). Accordingly, because the Arbitrator's interpretation of Article 31, Section 2.B imposes such restrictions, the Arbitrator's award affects management's right to assign work under § 7106(a)(2)(B) of the Statute.

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[6] When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

[7] For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the contract provision is an appropriate arrangement or whether it abrogates a § 7106(a) right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *FDIC, S.F. Region*, 65 FLRA at 107; *SSA, Dallas Region*, 65 FLRA 405, 408 n.5 (2010); *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 398 n.7 (2010) *U.S. Dep't of Health & Human Servs., Office of Medicare Hearings & Appeals*, 65 FLRA 175, 177 n.3 (2010); *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 173 n.5 (2010).

2. The award enforces a contract provision negotiated under § 7106(b)(3) of the Statute.

Under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *EPA*, 65 FLRA at 116-18.

The Agency argues that the contract provision is not an arrangement because it does not "redress" adverse effects on employees flowing from the exercise of management's rights. Exceptions at 7. When an agency exercises its right to assign work by denying or canceling annual leave, there is a reasonably foreseeable adverse effect on employees who request leave. *SSA*, 65 FLRA 339, 342 (2010) (Article 31, Section 2.B found to be an arrangement because it ameliorated adverse effects flowing from management's right to deny leave requests). As interpreted by the Arbitrator, Article 31, Section 2.B ameliorates or mitigates the adverse effects caused by management's exercise of its right to deny leave by addressing the circumstances when the Agency can deny leave requests. *See id.* Accordingly, we find that Article 31, Section 2.B is an arrangement under § 7106(b)(3). *Id.*

The Agency also argues that the provision is not tailored to benefit only adversely affected employees. However, because an arbitration award necessarily applies an agreement provision to actual aggrieved parties, arbitration awards are inherently tailored to adversely affected employees, and the Authority does not conduct a tailoring analysis in resolving exceptions to arbitration awards. *E.g.*, *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406, 410 n.5 (2001) (tailoring is part of determination as to whether an arrangement is within duty to bargain, not whether an agreed-upon provision, incorporated into a collective bargaining agreement, is enforceable as negotiated pursuant to § 7106(b)(3)). Therefore, the Agency's claim provides no basis for finding that the award does not enforce an arrangement.

With regard to whether the arrangement is appropriate, the Agency argues that the award "excessively interferes" with management's rights. Exceptions at 7-8. However, as stated above, the Authority no longer applies an excessive-interference standard to determine whether an arrangement is appropriate. *See EPA*, 65 FLRA at 118. Rather, the Authority applies an abrogation standard, which assesses whether the arbitration award "precludes [the] [a]gency from exercising" the affected management right. *U.S. Dep't of the Air Force, Air Force Materiel Command*, 65 FLRA 395, 399 (2010) (citation omitted). The Agency does not assert, and there is no basis for finding, that the award precludes the Agency from exercising its right to assign work. Therefore, the award enforces a contractual provision negotiated pursuant to § 7106(b) of the Statute, and we deny the Agency's exception.

B. The award does not fail to draw its essence from the CBA.

The Agency claims that the award fails to draw its essence from the CBA because the Arbitrator's interpretation of Article 31, Section 2.B is not a plausible interpretation of that contract provision. Exceptions at 8.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Agency argues that the Arbitrator's interpretation of Article 31, Section 2.B imposes a "high evidentiary burden" on the Agency by requiring it to "provide detailed evidence regarding workloads every time it exercises its statutory right to determine the number of employees assigned to work on a particular day in a particular office[.]" Exceptions at 8-9.

The Agency's claim is premised on a misinterpretation of the Arbitrator's award. The award does not order the Agency to provide detailed evidence regarding its workloads whenever it decides to make particular work assignment decisions. Rather, the award focuses on the Agency's change in its leave policy permitting up to two-thirds of its employees to take leave

the day before or the day after a federal holiday, and requires the Agency to exercise its discretion "appropriately" before discontinuing that policy. Award at 8. As the Agency's claim is based on an erroneous premise, the claim does not provide a basis for finding that the award fails to draw its essence from the CBA. *SSA, Region 5*, 58 FLRA 59, 61 (2002) (because appealing party misinterpreted award, no basis was provided for finding that award failed to draw its essence from CBA). Consequently, the award does not fail to draw its essence from the CBA, and we deny the Agency's exception.

C. The remedies ordered by the Arbitrator exceeded her authority.

The Agency argues that the Arbitrator exceeded her authority when she issued remedies that went beyond the scope of the matter submitted to arbitration. Exceptions at 10. Specifically, the Agency objects to the award's direction to restore its prior federal holiday leave policy, and revisit leave decisions already made for future holidays.

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulated issue, or the arbitrator's formulation of an issue to be decided in the absence of a stipulation, the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *See NTEU*, 64 FLRA 982, 986 (2010) (citing *U.S. Info. Agency, Voice of Am.*, 55 FLRA 197 (1999)). Nevertheless, if a grievance is limited to a particular grievant, then the remedy must be similarly limited. *See, e.g., U.S. Dep't of the Army, U.S. Corps of Eng'rs, Nw. Div.*, 65 FLRA 131, 133-34 (2010) (*U.S. Corps of Eng'rs*). Further, an arbitrator exceeds his or her authority when he or she finds no violation, but nevertheless awards a remedy. *See, e.g., U.S. Dep't of the Navy, Naval Sea Logistics Ctr., Detachment Atl., Indian Head, Md.*, 57 FLRA 687, 688-89 (2002) (*Indian Head*).

As stated previously, the Arbitrator found that the Agency violated the CBA by denying the *grievant's* request for annual leave, *see* Award at 8, but she rejected the Union's claim that the Agency acted improperly by discontinuing the two-thirds policy. *See id.* at 6. As remedies, she directed the Agency to restore the policy and to revisit leave decisions made for future holidays. However, the Arbitrator did not find, and there is no basis for concluding, that the remedies were related in any way to the Agency's denial of the grievant's leave request.

As such, the Arbitrator's remedies are deficient for two reasons. First, they relate to an action that was not found to be improper. Specifically, the Arbitrator did not find that the Agency violated the CBA when it discontinued the two-thirds policy.[8] *See, e.g., Indian Head*, 57 FLRA at 688-89. Second, the remedies extend to non-grievants. *See, e.g., U.S. Corps of Eng'rs*, 65 FLRA at 133-34. For these reasons, we find that the Arbitrator exceeded her authority by awarding these remedies, and we set them aside.[9]

In cases where the Authority sets aside an entire remedy, but leaves undisturbed an arbitrator's finding of an underlying violation, the Authority remands the award for determination of an alternative remedy. *See U.S. Dep't of Housing & Urban Dev.*, 65 FLRA 433, 436 (2011). Consistent with the above cited precedent, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

V. Decision

The Agency's contrary to law and essence exceptions are denied. The remedies are set aside, and the award is remanded to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.[10]

[8] We disagree with the dissent's statement that "[t]he Arbitrator found that the Agency violated Article 31, Section 2.B of the CBA because the Agency did not act reasonably when it changed its leave policy relating to federal holidays." Dissent at 10. In this regard, the Arbitrator found that the Agency violated the CBA "when it denied the [g]rievant's request for annual leave." Award at 7-8.

[9] Member Beck would also conclude that the award is contrary to law because it is not a foreseeable remedy for the specific violation of Article 31, Section 2.B that was found by the Arbitrator – denying grievant's leave request. *See supra* note 7 (citing *FDIC*, 65 FLRA at 107; *EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck)).

[10] In view of this conclusion, it is not necessary to address the Agency' exception concerning whether the SQA remedy ordered by the Arbitrator is contrary to law.

Member DuBester, Dissenting in Part:

I agree with my colleagues that the Agency's management rights and essence exceptions should be denied. However, contrary to my colleagues, I would also conclude that the Arbitrator did not exceed her authority, and that the Arbitrator's remedy is not otherwise contrary to law.

Regarding the Agency's exceeded-authority exception, the focus of the grievance, and the issue addressed by the Arbitrator, was whether the Agency violated the parties' collective bargaining agreement (CBA). *See* Award at 3. The Arbitrator found that the Agency violated Article 31, Section 2.B of the CBA because the Agency did not act reasonably when it changed its leave policy relating to federal holidays. As a remedy, the Arbitrator ordered the Agency to restore its prior policy in order to comply with the CBA.

Arbitrators have great latitude in fashioning remedies. *See, e.g., AFGE, Local 916*, 57 FLRA 715, 717 (2002) (citing *NTEU, Chapter 68*, 57 FLRA 256, 257 (2001)). In addition, nothing in the issue that the Arbitrator addressed and resolved restricted the remedy the Arbitrator could order if she found a violation of the CBA. *See* Award at 3. Moreover, the Arbitrator's remedy is directly responsive to her finding that the Agency violated the CBA. *E.g., U.S. Dep't of the Air Force, 72nd Mission Support Group, Tinker Air Force Base, Okla.*, 60 FLRA 432, 435 (2004) (arbitrator did not exceed authority because remedy was responsive to issue at arbitration and fell within broad discretion afforded an arbitrator to fashion an appropriate remedy). Therefore, I would conclude that the remedies ordered by the Arbitrator did not exceed her authority.

I would also reject the Agency's claim that the award is contrary to law because the status quo ante (SQA) is not an appropriate remedy in a case such as this one, where no ULP violation was found.[*] Exceptions at 9. The Agency fails to cite any authority supporting its assertion that arbitrators cannot order a SQA remedy for a contract violation. As noted above, arbitrators have broad discretion to fashion remedies. *See, e.g., AFGE, Local 916*, 57 FLRA at 717. As the Agency has failed to cite any authority to support its assertion, consistent with the Arbitrator's broad discretion to fashion remedies, I would deny the Agency's SQA exception. Accordingly, I would uphold the Arbitrator's award.

[*] With regard to the unfair labor practice (ULP) charge filed by the Union, the Agency asserts that the Authority ruled that it did not commit a ULP when it changed its policy because the Agency had no obligation to bargain over the change. Exceptions at 9. The Agency's claim that the Authority found that it did not commit a ULP is inaccurate. The Union's ULP charge was dismissed by a Regional Director of the Authority. *See* Award at 3. Under the Authority's Regulations, the General Counsel, through the regional directors, has prosecutorial discretion to dismiss ULP charges. *See* 5 C.F.R. § 2423.10. As the ULP charge in this case was never prosecuted, the Authority did not rule on whether the Agency committed a ULP. Therefore, the Agency's claim in this regard does not provide any basis for finding the award deficient.